SOO LIP HONG

v.

TEE KIM HUAN

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
MOHD GHAZALI YUSOFF JCA
NIK HASHIM JCA
[CIVIL APPEAL NO: J-02-446-2001]
19 AUGUST 2005

CONTRACT: *Sale and purchase of property - Option - Specific performance - Whether a proper and formal contract prepared, concluded and executed - Whether merely a conditional offer and acceptance - Whether terms and conditions remained a matter of conjecture - Whether specific performance ought to be granted*

CONTRACT: *Specific performance - Sale and purchase of property - Option - Whether there was a concluded contract susceptible of being enforced by way of specific performance - Specific Relief Act 1950, s. 21(3)*

CONTRACT: *Damages - Property - Arrears of rental - Whether there was a concluded contract between parties - Whether evidence showed that respondent suffered loss or injury - Whether computation of damages by trial judge erroneous*

The appellant was the owner of a three-storey shophouse in Johor Bahru ('the said property'). It was the respondent's case that the appellant and he, on 19 May 1990, signed an option for the sale and purchase of the said property for the purchase price of RM400,000 ('the option'). The respondent claimed that he paid the option sum of RM1,000 to the appellant and deposited RM39,000, the purported balance of 10% of the purchase price – both cheques were issued from the account of one T-Mart Holdings Sdn Bhd – with his solicitors. Despite two letters and several phone calls by the respondent to the appellant, the latter failed to sign the sale and purchase agreement and to collect the said sum of RM39,000. Sometime later, the respondent's solicitors returned the sum of RM39,000 to T-Mart Holdings Sdn Bhd upon its request. In 1995, the respondent issued a third letter insisting that the appellant sign the sale and purchase agreement in order to avert a legal action by the respondent for specific performance. Subsequently, on 4 January 1996 *ie*, about

5½ years from the date of the option, the respondent filed an action for specific performance of the option, loss of rental at RM3,000 per month from 1 October 1990 up to the date of settlement, interest at 8% per annum from the date of the writ of summons up to the date of settlement, damages and costs.

The appellant denied having signed the option and having ever received the cheque for the sum of RM1,000 as payment for the option sum. He then contended that the option was void as it was an agreement made without consideration. The learned judge, however, concluded that the respondent had successfully proved his case and accordingly entered judgment for the respondent. Hence, the present appeal. The appellant submitted that the learned trial judge erred, *inter alia*, in: (i) ruling that there was a valid contract for sale and purchase of the said property when the evidence adduced at the trial had in fact conclusively proved that the appellant had received no consideration from the respondent; (ii) disregarding the law of specific performance; and (iii) ordering the appellant, the owner of the said property, to pay damages in the form of rental for a period of more than 10 years notwithstanding that no evidence at all was adduced by the respondent during the trial to prove any loss or damage, and ordering interest at 8% per annum on "arrears of rental" as if there was outstanding rent due and owing by the appellant to the respondent, who had no proprietary interest whatsoever in the said property. In this appeal, the most important question was whether the learned trial judge had adequately approached the main issue before him in making the decision that he did, namely, whether the facts supported his finding that there was a concluded contract and that all that needed to be done was to execute a formal sale and purchase agreement.

Held (allowing the appeal)
Per Mohd Ghazali Yusof JCA:

[1] In the circumstances of the instant case, there was no agreement at all until a proper and formal contract had been prepared, concluded and executed. On the facts, what was intended was that the option sum paid should be conditional on the execution of a proper sale and purchase agreement to be prepared and signed within one month. The option money paid was an expression of a desire for a further contract and until that further contract was executed, there should be no binding contract. It was nothing more than a conditional offer and acceptance, and would only ripen into a contract when a sale and purchase agreement, the terms of which have been agreed to between the parties, was executed. The signing of a sale and purchase agreement under the circumstances of this case was

not just a mere formality. From the facts, it was clear that the main denominator of the option was that it was agreed that the parties would execute a sale and purchase agreement within one month. Until that had been done it could not be said that there was a concluded contract. What was clear was that the parties had yet to agree on the terms to be included in the sale and purchase agreement. That being the situation, what would be the terms and conditions that seem to have been agreed to between the parties would remain largely a matter of conjecture and as such, an order for specific performance should not have been granted in such circumstances. (pp 132 g-h & 133 a-b, e-f)

[2] The learned trial judge did not seem to have considered s. 21(3) of the Specific Relief Act 1950 at all. The facts clearly did not show that the respondent had done substantial acts or suffered losses in consequence of the refusal, if any, of the appellant to sign the sale and purchase agreement prepared by the respondent's solicitors. The learned judge had failed to adequately approach the main issue *viz.* whether there was a concluded contract susceptible of being enforced by way of specific performance. The respondent's solicitors had sent two letters within the one-month timeframe as agreed requesting the appellant to appear at their office to sign the sale and purchase agreement, to which the appellant did not respond. The evidence showed that the sum of RM39,000 was subsequently returned to T-Mart Holdings Sdn Bhd in July 1990 upon its request *ie*, two months after the option was signed. That would denote that the respondent had seriously abandoned any desire to seriously pursue the matter. He did not take any further action when there was no response from the appellant until 18 July 1995, when his solicitors wrote to the appellant threatening to take legal action for specific performance unless the latter showed up at their office to sign the sale and purchase agreement. It was also noted that the option was stamped on 17 January 1996 *ie*, 13 days after the action was filed. Specific performance surely should not be granted in such circumstances. (pp 134 c-e & 135 f-g)

[3] The issue of damages, *viz.* the arrears of rental ordered, in the light of what was stated above, was a non-issue. However, if there had been a concluded contract, the computation of damages made by the trial judge would be erroneous. The object of an award of damages was only to give the respondent, in the instant case, compensation for the damage, loss or injury he had suffered owing to the breach of contract, and thus, the measure of damages had to be based on the actual damages arising from the breach. On the facts, the cheque for the option sum was never cleared for payment. Therefore, that RM1,000 would remain the property of T-Mart Holdings Sdn Bhd, which had also requested the sum of RM39,000

to be returned to it; the sum was in fact returned. There was nothing in the evidence to show that the respondent had suffered any actual damage, loss or injury. (p 136 a-d)

[4] The learned trial judge had erred in granting specific performance in the circumstances; hence, this appeal must be allowed. The respondent's claim must fail and this court accordingly set aside all the orders made by the learned trial judge, and ordered that the respondent bear the costs here and below. (p 136 e)

[Order accordingly.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu adalah pemilik sebuah rumah kedai tiga tingkat Johor Bahru ('hartanah tersebut'). Adalah menjadi kes responden bahawa pada 19 Mei 1990 beliau dan perayu telah menandatangani satu opsyen bagi jual beli hartanah tersebut pada harga RM400,000 ('opsyen'). Responden mendakwa bahawa beliau telah membayar wang opsyen sebanyak RM1,000 kepada perayu, dan telah mendepositkan dengan peguamcaranya sebanyak RM39,000, iaitu baki bagi 10% harga belian, dengan kedua-dua cek dikeluarkan dari akaun T-Mart Holdings Sdn Bhd. Perayu bagaimanapun gagal menandatangani perjanjian jual beli atau menuntut jumlah RM39,000 tersebut, walaupun diminta berbuat demikian oleh responden melalui dua pucuk surat serta beberapa panggilan telefon. Berikutnya, peguamcara responden telah memulangkan cek RM39,000 kepada T-Mart Holdings Sdn Bhd ekoran permintaan pihak terkemudian itu. Pada tahun 1995, responden menulis surat ketiga meminta supaya perayu menandatangani perjanjian jual beli bagi mengelakkan tindakan undang-undang untuk pelaksanaan spesifik. Kemudian, pada 4 Januari 1996, iaitu lebih kurang 5½ tahun dari tarikh opsyen, responden memfail tindakan untuk pelaksanaan spesifik opsyen, kehilangan sewa sebanyak RM3,000 sebulan dari 1 Oktober 1990 sehingga ke tarikh penyelesaian, faedah sebanyak 8% setahun dari tarikh writ saman hingga ke tarikh penyelesaian, gantirugi dan kos.

Perayu menyangkal pernah menerima bayaran opsyen melalui cek berjumlah RM1,000. Perayu kemudian menyatakan bahawa opsyen adalah tak sah kerana ia adalah satu perjanjian yang dibuat tanpa balasan. Yang arif hakim, bagaimanapun, memutuskan bahawa responden telah membuktikan kesnya dan kerana itu memberikan penghakiman kepada responden. Perayu merayu. Antara lain, perayu berhujah bahawa yang arif hakim khilaf apabila: (i) memutuskan bahawa wujud kontrak jual beli yang sah bagi hartanah tersebut sedangkan keterangan jelas menunjukkan bahawa perayu tidak menerima apa-apa balasan baginya; (ii) tidak mengendahkan undang-undang pelaksanaan spesifik; dan (iii) memerintahkan perayu, selaku pemilik hartanah tersebut, membayar gantirugi

dalam bentuk sewa untuk tempoh melebihi 10 tahun walaupun tiada keterangan dikemukakan oleh responden semasa perbicaraan bagi membuktikan kerugian atau kehilangan, serta memerintahkan faedah pada kadar 8% setahun atas "tunggakan sewa" seolah-olah wujud sewa yang tertunggak dan tidak dibayar oleh responden kepada perayu, yang tidak mempunyai sebarang kepentingan milikan dalam hartanah tersebut. Soalan paling penting yang berbangkit adalah sama ada yang arif hakim bicara telah meneliti secukupnya isu utama yang ada di hadapan beliau sebelum mencapai keputusannya, iaitu, sama ada dapatannya bahawa wujud suatu kontrak yang sah di mana yang tinggal untuk dilakukan hanyalah memeterai perjanjian jual beli itu secara formal, disokong oleh fakta-fakta.

Diputuskan (membenarkan rayuan)
Oleh Mohd Ghazali Yusof HMR:

[1] Dalam halkeadaan kes semasa, perjanjian tidak wujud kecuali selepas perjanjian sebenar dan formal disedia, dipersetujui dan ditandatangani. Berdasarkan fakta, apa yang diniatkan adalah bahawa wang opsyen yang dibayar adalah tertakluk kepada pemeteraian perjanjian jual beli yang sebenar yang akan disediakan dan ditandatangani dalam tempoh sebulan. Bayaran wang opsyen hanya menandakan keinginan untuk memeterai kontrak di masa depan, dan selagi kontrak sedemikian tidak dimeterai, tidak wujud kontrak yang mengikat. Ia tidak lebih dari satu tawaran dan penerimaan bersyarat, yang hanya akan matang dan menjadi satu kontrak apabila perjanjian jual beli yang mengandungi terma-terma yang dipersetujui oleh kedua-dua pihak ditandatangani. Pemeteraian perjanjian jual beli di bawah halkeadaan kes di sini bukan hanya suatu formaliti. Berdasarkan fakta, jelas bahawa petunjuk utama opsyen adalah bahawa ianya dipersetujui bahawa pihak-pihak akan memeterai satu perjanjian jual beli dalam masa sebulan. Sehingga itu dibuat, ianya tidak boleh dikatakan bahawa suatu kontrak yang sah telah dimeterai. Apa yang jelas adalah bahawa pihak-pihak masih lagi belum bersetuju mengenai terma-terma yang hendak dimasukkan di dalam perjanjian jual beli. Dalam keadaan sedemikian, terma dan syarat perjanjian yang sudah dipersetujui oleh pihak-pihak masih menjadi teka-teki, dan kerana itu perintah pelaksanaan spesifik tidak seharusnya diberi.

[2] Yang arif hakim bicara nampaknya langsung tidak mempertimbang s. 21(3) Akta Relif Tertentu 1950. Fakta jelas tidak menunjukkan bahawa responden telah banyak menyumbang atau telah mengalami banyak kerugian akibat dari keengganan perayu, jika wujud, untuk menandatangani perjanjian jual beli yang disediakan oleh peguamcara responden. Yang arif hakim gagal mendekati isu utama, iaitu, sama ada wujud kontrak yang dipersetujui dan

boleh dilaksanakan melalui pelaksanaan spesifik. Sebagaimana dipersetujui, peguamcara responden telah menghantar dua surat dalam tempoh sebulan tersebut, memohon perayu supaya datang ke pejabat mereka untuk menandatangani perjanjian jual beli, yang mana tidak diendahkan oleh perayu. Keterangan menunjukkan bahawa jumlah RM39,000 tersebut akhirnya dipulangkan kepada T-Mart Holdings Sdn Bhd pada Julai 1990 atas permintaan, iaitu, dua bulan setelah opsyen ditandatangani. Ini menandakan bahawa responden serius untuk melupakan hasrat untuk memanjangkan perkara tersebut. Beliau tidak mengambil sebarang tindakan walaupun tidak ada tindak balas dari perayu sehinggalah 18 Julai 1995, bilamana peguamcaranya menulis kepada perayu mengugut untuk mengambil tindakan undang-undang untuk pelaksanaan spesifik kecuali jika perayu hadir di pejabat mereka untuk menandatangani perjanjian jual beli. Harus juga diperhatikan bahawa opsyen telah disetemkan pada 17 Januari 1996, iaitu 13 hari selepas tuntutan difailkan. Pelaksanaan spesifik sepatutnya tidak diberi dalam halkeadaan sedemikian.

[3] Isu kerugian, iaitu tunggakan sewa yang diperintahkan, tidak berbangkit sama sekali mengambil kira apa yang diperkatakan di atas. Bagaimanapun, jika wujud suatu kontrak yang dipersetujui, pengiraan gantirugi seperti yang dibuat oleh yang arif hakim adalah khilaf. Tujuan award gantirugi adalah untuk memeberikan pampasan kepada responden kerana kerugian dan kehilangan yang ditanggung olehnya kerana kemungkiran kontrak, dan kerana itu, kadar gantirugi hendaklah sesuai dengan kerugian sebenar yang berbangkit dari kemungkiran tersebut. Fakta menunjukkan bahawa cek untuk wang opsyen tidak pernah diserahkan untuk bayaran. Oleh yang demikian, wang RM1,000 itu masih kepunyaan T-Mart Holdings Sdn Bhd, yang telah juga meminta supaya jumlah RM39,000 dikembalikan kepadanya; dan jumlah tersebut telah pun dipulangkan. Tidak ada sesuatupun pada keterangan yang menunjukkan bahawa responden telah mengalami kerugian sebenar, kehilangan mahupun kecederaan.

[4] Yang arif hakim bicara khilaf apabila membenarkan pelaksanaan spesifik di sini; maka itu, rayuan harus dibenarkan. Tuntutan responden tidak boleh berjaya dan kerana itu mahkamah mengenepikan semua perintah-perintah yang dibuat oleh yang arif hakim bicara dan memerintahkan responden menanggung kos di sini dan di mahkamah di bawah.

Perintah sekadarnya.]

Case(s) referred to:
Daiman Development Sdn Bhd v. Mathew Lui Chin Teck [1981] 1 MLJ 56 ***(foll)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 371 ***(refd)***
Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch 284 ***(foll)***
Voo Syun Mui v. Yap Mooi Mooi [1984] 2 CLJ 167; [1984] 1 CLJ (Rep) 457 HC ***(dist)***

Legislation referre to:
Specific Relief Act 1950, s. 11, 20, 21(3)

For the appellant - Gan Techiong; M/s Gan & Lim
For the respondent - Wong Kim Fatt (KM Ong with him); M/s KM Ong, Lee & Co

Reported by Suresh Nathan

JUDGMENT

Mohd Ghazali Yusoff JCA:
The appellant (the defendant in the court below) is the owner of a 3-storey shophouse in Johor Bahru known as No. 194A, 194B & 194C, Jalan Sri Pelangi, Taman Pelangi Johor Bahru (hereinafter referred to as "the said property"). It was the respondent's case (the plaintiff in the court below) that on 19 May 1990, between 10am and 11am, the appellant and him signed an option for the sale and purchase of the said property for the purchase price of RM400,000 (hereafter referred to as "the option"). The option, which was drafted in the English language by the respondent in his own handwriting, reads:

Option

I, Mr Soo Lip Hong I/C 2345628 on 19th May 1990 Give the option to Mr Tee Kim Huan I/C 7657233, Agree to sell the 3 storey shophouse which address at 194ABC Jln Sri Pelangi Tmn Pelangi 80400 JB. Total selling price M$400,000-00. Option conditions:

1) Within one month have to sign the sell & purchase agreement.

2) Option money M$1000/-.

3) If within one month didn't sign the agreement the option money will be forfeited.

(Sign.) (Sign.)

Soo Lip Hong Tee Kim Huan

Dated 19th May 1990.

The respondent claimed, pursuant to the signing of the option, he paid the option sum of RM1,000 to the appellant *vide* Perwira Habib Bank cheque No: 083862 and made out in the appellant's name. The respondent testified that the cheque was issued from the account of T-Mart Holdings Sdn Bhd, a company in which he is the major shareholder. He then appointed Messrs Chew, Ong & Partners as solicitors to act for him and deposited with them the sum of RM39,000 *vide* Perwira Habib Bank cheque No. 083881 dated 5 June 1990 being, according to him, the balance of 10% of the purchase price. He stated that this cheque was a post-dated cheque and was also issued from the account of T-Mart Holdings Sdn Bhd. On 28 May 1990 his solicitors wrote to the appellant; that letter reads:

> RE: SALE OF 194A/194B/194C
> JALAN SRI PELANGI, JOHOR BAHRU
>
> We act for Mr Tee Kim Huan of No. 8, Jalan Jim Quee, Johor Bahru.
>
> We refer to the option dated 19/5/1990 given by you to our client.
>
> Please call on us to sign the Agreement, so that we can pay you the 1st 10% of the purchase price.

There was no response to the above letter. Consequently, his solicitors wrote another letter dated 8 July 1990 which reads:

> RE: SALE OF 194A/194B/194C
> JALAN SRI PELANGI, JOHOR BAHRU
>
> We refer to our letter to you dated 28/5/1990 and regret that you have not responded to same.
>
> Kindly call at our office forthwith to sign the Sale and Purchase Agreement and collect the 1st 10% of the Sale price.

There was also no response to that second letter. The respondent claimed that several telephone calls were made to the appellant but the latter failed, refused and/or neglected to sign the sale and purchase agreement and to collect the said sum of RM39,000 that he deposited with his solicitors. Sometime in that same month, ie, July 1990 the respondent's solicitors returned the said sum of RM39,000 to T-Mart Holdings Sdn Bhd upon its request.

Nothing happened until 18 January 1995, ie, about 4 ½ years later when the respondent's solicitors issued a third letter which reads:

RE: SALE OF 194A/194B/194C
JALAN SRI PELANGI, JOHOR BAHRU

We refer to our letter dated 8/7/1990.

TAKE NOTICE that unless you come and sign the sale agreement within 7 days from date hereof, our instruction is to file summons for specific performance against you.

On 4 January 1996, ie, about 5½ years from the date of the option, the respondent filed this action claiming for specific performance of the option, loss of rental at RM3,000 per month from 1 October 1990 up to the date of settlement, interest at 8% per annum from the date of the writ of summons up to the date of settlement, damages and costs.

In his defence, the appellant denied having signed the option and having ever received the cheque for the sum of RM1,000 as payment for the option sum as alleged. He then contended that the option was void as it was an agreement made without consideration. He stressed that the evidence clearly showed that no such cheque, if at all issued, was ever presented for payment. The evidence adduced at the trial by the respondent to show that such a cheque was issued was in the form of a cheque-butt from the account of T-Mart Holdings Sdn Bhd. In relation to this, the appellant contended that if at all such a cheque was ever issued for the purpose of payment of the option sum, it was a cheque from the account of T-Mart Holdings Sdn Bhd and not the respondent. In his grounds of decision in dealing with this contention, the learned trial judge said:

As pointed out earlier, there was no dispute that PW1 was, at all material times, the main and majority shareholder of the Co. In that context, in so far as the assets of the Co. was concerned then, PW1 personally and the Co. can be said to be "the one and the same person" having full control over such assets of the Co. In the absence of fraud or similar illegal acts, how PW1 administered the Co's assets should not be of any concern to the Defendant. Thus the Defendant's contention that, there was a failure of consideration in the sale and purchase ("S&P") of the relevant property in issue *vide* P1, has also to be rejected.

In relation to the two cheques issued from the account for T-Mart Holdings Sdn Bhd for the alleged payment of the option sum and the balance of 10% of the purchase price, respectively the learned trial judge said:

As earlier discussed, the act of PW1 issuing both the aforesaid cheques to DW1 and his solicitor for the reasons stated above defies logic if they were issued without any good reason, but just for the pleasure of dragging DW1 to Court. There was not an iota of evidence throughout the whole trial that there was any personal or commercial misunderstanding or "bad blood" between PW1 and DW1.

> There was also no evidence of any police report or similar things alike to suggest that PW1 was attempting to cheat DW1. In the absence of such evidence, the only irresistible factual inference I could draw would be for the purpose(s) of purchasing the relevant property by PW1 from DW1 as agreed by both parties as evidenced by P1. The genuineness of PW1's intention to purchase the said property was further enhanced by his act of engaging his solicitors followed by the deposit of RM39,000-00 to them for the reasons explained earlier and below.

With regards to the three letters to the appellant issued by the respondent's solicitors, especially the third letter dated 18 January 1995 (exh. P8), the learned trial judge said:

> That too received no response from DW1. There was no evidence to suggest that DW1 did not receive P8. Thus, the intention of PW1 to buy the material property of DW1 was made clearly known to DW1 as early as 8/1/95. If P1 was not duly executed by both PW1 and DW1, then the least DW1 should have done was to response to at least P8 by, for example, objecting PW1's intention of applying for the specific performance. His passive response to P6, P7 and P8, led me to conclude that DW1 did, in actual fact, signed P1 as contended by PW1. His vague explanation in respect of P6 can be found in his evidence-in-chief.

The learned trial judge also did not accept the appellant's claim that he did not sign the option as he was in Singapore on that material date, ie, 19 May 1990. After perusing the evidence in relation to this, he said:

> The culmulative (sic) effect of the above, compelled me to draw the necessary conclusion that, even though he did go to Singapore on the material date, he still did actually sign P1 either before he left for Singapore or after coming back from Singapore as there was no time stated in D22 as to when he went into and came back from Singapore as explained earlier.

As discussed earlier, the appellant denied that the signature on the option was his. In relation to this, the learned trial judge found that the signature was that of the appellant and that he did sign the option on that material date. The learned trial judge accepted the opinion of a handwriting expert, called by the respondent, who was of the view that that signature was that of the appellant.

At the end of the day the learned trial judge concluded that the respondent had successfully proved his case and accordingly entered judgment for the respondent and hence, this appeal.

Before us, learned counsel for the appellant submitted that the learned trial judge erred, *inter alia*, in:

(i) ruling that there was a valid contract for sale and purchase of the said property when the evidence adduced at the trial had in fact conclusively proved that the appellant had received no consideration from the respondent;

(ii) disregarding the law on specific performance; and

(iii) ordering the appellant, the owner of the said property, to pay damages in the form of rental for a period of more than 10 years notwithstanding that no evidence at all was adduced by the respondent during the trial to prove any loss or damage and ordering interest at 8% per annum on "arrears of rental" as if there was outstanding rent due and owing by the appellant to the respondent who has no proprietary interest whatsoever in the said property.

In opposing the appeal, learned counsel for the respondent submitted the option merely states that the appellant agrees to sell to the respondent the said property at the selling price of RM400,000 with the following conditions:

(i) the sale and purchase agreement is to be signed within one month;

(ii) the option money is RM1,000;

(iii) if the sale and purchase agreement is not signed within one month, the option money is to be forfeited.

Counsel for the respondent contended these terms are clear and unambiguous and can be easily understood by both the parties. He submitted that the appellant would not have signed the option without receiving the said cheque for the sum of RM1,000 and the fact that the cheque was not presented at the bank does not mean that the appellant did not receive it. He then argued that s. 11 of the Specific Relief Act 1950 provides that unless and until the contrary is proven, the court may presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money and hence the respondent was entitled to specific performance and to loss of rental. Counsel pointed out had the transaction been completed in 1990 the respondent would have been able to rent the said property for valuable consideration and that a monthly rental of RM3,000 for the said property is a reasonable figure.

From our reading of his grounds of decision, we noted that the learned trial judge had made the following findings of fact, namely:

(i) that the option was signed by the appellant and respondent on 19 May 1990;

(ii) that the appellant received the cheque for the option sum of RM1,000.

We do not intend to disturb these finding of facts. Be that as it may, in our view, the question before us in this appeal is whether the learned trial judge has adequately approached the main issue before him in making the decision that he did, namely, whether the facts supported his finding that there was a concluded contract and that all that need to be done was to execute a formal sale and purchase agreement.

What is an option? According to *Osborn's Concise Law Dictionary* (8th edn) an "option" is "a right of choice; a right conferred by agreement to buy or not at will any property within a certain time". In the instant case, the respondent was given the option to buy the said property from the appellant. Upon payment of the option sum of RM1,000 the legal effect would be that the respondent was conferred with a right to purchase the said property at RM400,000. He can exercise that right to purchase within one month and if he does so, the parties will have to execute a sale and purchase agreement within that one month. The option sum will be forfeited by the appellant if the sale and purchase agreement is not executed within one month. The learned trial judge found that the cheque for the option sum of RM1,000 was issued although it was never presented for payment.

Looking at the facts, the respondent would seem to have exercised his right to purchase the property when, through his solicitors, he requested the appellant to present himself before the solicitors and sign the sale and purchase agreement which they have prepared.

From our reading of his grounds of decision, the learned trial judge seems to be of the view that once it was proved that the option was signed by the appellant and the cheque for the option sum of RM1,000 was received by him, there was a concluded contract and it would follow that all that need to be done after that was to execute a sale and purchase agreement. It would also seem to follow that he was of the view that the execution of a sale and purchase agreement of the said property would be a mere formality once the option to purchase the same was exercised by the respondent.

We would approach this appeal before us in the following manner, namely, when the respondent exercised his right to purchase, was there a concluded contract so that the parties are bound by it and the appellant would have to sign the sale and purchase agreement that was prepared by the respondent

regardless of whether he would agree to its terms, or should that exercise of right to purchase be treated as merely a preliminary act with the result that until a sale and purchase agreement the terms of which are agreeable to both parties is signed, there was no concluded contract as yet?

In *Voo Syun Mui v. Yap Mooi Mooi* [1984] 2 CLJ 167; [1984] 1 CLJ (Rep) 457, which was included in the respondent's bundle of authorities but not specifically referred to, the defendant gave the plaintiff an option in writing in the following terms:

> In consideration of the sum of $300.00 paid by Madam Yap Mooi Mooi (f) (NRIC NO. 0487210) of No. 34, Cross Street, Kuala Lumpur (the receipt of which I hereby acknowledge) I hereby grant to Madam Yap Mooi Mooi an option to purchase my property known as Lot 39, Bukit Seputeh, Kuala Lumpur at the price of $270,000.00 only.
>
> On exercising the option a deposit of 10% of the sale price shall be paid and the balance of the sale price shall be paid within one (1) month from the payment of the deposit.
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> This option shall be valid for 2 weeks from the date hereof.

The plaintiff alleged that a letter exercising the option together with a cheque in the sum of $27,000 being payment of deposit of 10% of the purchase price was given and acknowledged by a servant or agent of the defendant within time. The plaintiff then alleged that in spite of the fact that the option had been exercised, the defendant refused to complete the sale and therefore asked for an order of specific performance of the option of the sale of the property. In opposing the plaintiff's claim, the defendant, *inter alia*, contended that the option was subject to contract being signed and that no contract was ever signed and therefore there was no concluded contract between the parties. The learned trial judge gave judgment for the plaintiff and granted an order for specific performance. The defendant's appeal to the Federal Court against that order was dismissed. In delivering the judgment of the Federal Court, Syed Agil Barakbah, FJ said:

> Substantially the appeal revolves around a question of fact. ...
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> In the circumstances of this case we see no merit in the appellant's contention. In our view the evidence and exhibits in this case and also the conduct of the appellant clearly show that it was the intention of the parties to come to a definite and complete agreement on the subject of the sale. What remained to be done was for the respondent to exercise the option in accordance with the terms stated in the option. The mere fact that it was subject to an agreement to be signed did not necessarily mean there was no legal binding and enforceable agreement.

We would think that the above case has to be distinguished on the facts. In that case, the parties to the transaction, the property, the price and the terms they considered essential have been identified in the option, *viz.*, that upon exercising the option, a deposit of 10% of the sale price shall be paid and the balance of the sale price shall be paid within one month from the payment of the deposit. It was clearly a firm offer.

In the instant case, we are of the view that several essential terms have not been identified in the option. The question which we feel that the learned trial judge did not sufficiently consider in finding that there was a concluded contract is whether the parties have ascertained the terms and agreed and all that was contemplated was the mere reduction of the terms into a more formal shape. If there is an essential term which has yet to be agreed and there is no express provision for its solution, the result in point of law is that there is no binding contract. In *Daiman Development Sdn Bhd v. Mathew Lui Chin Teck* [1981] 1 MLJ 56, Sir Garfield Barwick in delivering the judgment of the Privy Council said:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each other considered against the background of the circumstances in which they had been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in writing the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangements might appear to be, they do not so intend until the occurrence of some further event, including the signature of some further document or the making of some further arrangement.

Under the circumstances of the instant case, we are of the view that until a proper and formal contract had been prepared, concluded and executed there was no agreement at all. Looking at the facts we are of the view that what was intended was that the option sum paid should be conditional on the execution of a proper sale and purchase agreement to be prepared and signed within one month. The option money paid was an expression of a desire for a further contract and until that further contract was executed there should be no binding contract. It was nothing more than a conditional offer and acceptance, and would only ripen into a contract when a sale and purchase agreement, the terms of which have been agreed to between the parties, is executed.

We do not think that the signing of a sale and purchase agreement under the circumstances of this case is just a mere formality. From the facts, it was clear that the main denominator of the option is that it was agreed that the parties will execute a sale and purchase agreement within one month. Until that has been done, we cannot see how it can be said that there was a concluded contract. What is clear is that the parties have yet to agree on the terms to be included in the sale and purchase agreement. The option did not provide that it would be a term of the sale and purchase agreement that the respondent as purchaser is required to pay a sum of 10% of the purchase price on the date of execution of the sale and purchase agreement. Further, as regards the balance of 90% of the purchase price, it has yet to be agreed what the terms would be unlike the situation in *Voo Syun Mui v. Yap Mooi Mooi (supra)* where it was clearly stated "on exercising the option a deposit of 10% of the sale price shall be paid and the balance of the sale price shall be paid within one (1) month from the payment of the deposit". In the instant case, the respondent deposited the sum of RM39,000 with his solicitors on the assumption that he would have to pay 10% of the purchase price upon execution of the sale and purchase agreement to be entered into between the parties. Looking at the option, that was surely not one of the conditions specified or identified as an agreed term. We do not think that the court can give credence to such an assumption or even imply that that will be a term of the contract. What is clear is that the parties have yet to agree as to the terms on payment of the purchase price, eg, should it be paid in the form of a lump sum payment or will there be allowance for the respondent to pay the purchase price by way of instalments within a certain period of time. The terms in the contract to be entered into must be made clear to the parties that it was on those terms. There is also no evidence to show that the parties agreed that a 10% deposit will be paid upon the signing of the sale and purchase agreement. That being the situation, we are of the view that what would be the terms and conditions that seem to have been agreed to between the parties would remain largely a matter of conjecture and as such, an order for specific performance should not have been granted under such circumstances.

Section 20 of the Specific Relief Act 1950 reads:

(1) The following contracts cannot be specifically enforced:

(c) a contract the terms of which the court cannot find with reasonable certainty;

Section 21 of the same reads:

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so: but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(3) A case in which the court may properly exercise a discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

We would agree with the submission of learned counsel for the appellant that the learned trial judge did not seem to have considered s. 21(3) of the Specific Relief Act at all. The facts clearly did not show that the respondent had done substantial acts or suffered losses in consequence of the refusal, if any, of the appellant to sign the sale and purchase agreement prepared by the respondent's solicitors.

Upon perusing his grounds of decision, we find that the learned trial judge had failed to adequately approach the main issue, *viz*., whether there was a concluded contract susceptible of being enforced by way of specific performance. In *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch 284, an alleged contract for the sale of a leasehold house were contained in letters. The issue before the court was whether the letters constituted a binding contract. The court held, on the construction of the documents, there was no complete contract susceptible of being enforced by way of specific performance. In his judgment, Parker J said (at p. 288):

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire.

Further, in the instant case, the option identified the respondent as the person to whom the right to purchase was granted. It did not provide or imply that the respondent can appoint another person to be the purchaser. The two cheques involved were issued from the account of the T-Mart Holdings Sdn Bhd, a company and hence a separate legal entity. The question which would remain unanswered would be whether it would be a term of the sale and purchase agreement that T-Mart Holdings Sdn Bhd is the purchaser.

In *M. Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371, Hashim Yeop A. Sani, SCJ (as he then was) said the power of the court to grant specific performance is discretionary and a question whether specific performance should be granted must be considered in the light of surrounding circumstances. He said (at p. 377):

> Specific performance is an equitable relief which may be granted by the court to enforce against the defendant the duties and obligations which he had agreed by contract to perform. The remedy is special and extraordinary in its character and the court has a discretion either to grant it or not. However, the discretion is not an arbitrary or capricious discretion but it is to be exercised on fixed principles. The conduct of the plaintiff such as delay or laches or breach on his part or some other circumstances outside the contract may render it inequitable to grant the remedy of specific performance.

In the instant case we are of the view, as discussed above, that until a sale and purchase agreement has been executed by the parties, there was no concluded contract as yet. The respondent's solicitors sent two letters within the one month time-frame as agreed requesting the appellant to appear at their office to sign the sale and purchase agreement. The appellant did not respond to those letters. The evidence showed that the said sum of RM39,000 was subsequently returned to T-Mart Holdings Sdn Bhd in July 1990 upon its request, ie, two months after the option was signed. This, to us would denote that the respondent has abandoned any desire to seriously pursue the matter. He did not take any further action when there was no response from the appellant until 18 July 1995, ie, about 4½ years later after the option was signed, when his solicitors wrote to the appellant threatening to take legal action for specific performance unless the latter showed up at their office to sign the sale and purchase agreement. We also noted that the option was stamped on 17 January 1996, ie, 13 days after the action was filed. Specific performance surely should not be granted under such circumstances.

On the issue of damages, *viz.*, the arrears of rental ordered and which, in the light of what we have said above, is now a non-issue, we would think that had there been a concluded contract, the computation of damages made by the trial judge would be erroneous. Damages has been defined as the sum of money which a person wronged is entitled to receive from the wrongdoer as compensation for the wrong and the principle is that the injured party should be put as nearly as possible in the same position, so far as money can do it, as if he had not been injured. The object of an award of damages is only to give the respondent, in the instant case, compensation for the damage, loss or injury he has suffered owing to the breach of contract and thus the measure of damages has to be based on the actual damage directly arising from the breach and actual expenses incurred are also recoverable in the form of damages. The cheque for the option sum was never cleared for payment and thus that RM1,000 would remain the property of T-Mart Holdings Sdn Bhd. T-Mart Holdings Sdn Bhd had also requested for the said sum of RM39,000 deposited with the respondent's solicitors to be returned to them and it was in fact returned. There is nothing in evidence to show that the respondent has suffered any actual damage, loss or injury.

On the whole, we are of the view that what was contemplated was that a formal contract will be executed which would embody certain terms or conditions which have yet to be ascertained. Until that has been done, we cannot see how it can be said that there was a concluded contract. It is our decision that the learned trial judge had erred in granting specific performance under the circumstances and hence this appeal must be allowed. The respondent's claim must fail and we would accordingly set aside all the orders made by the learned trial judge and order that the respondent bear the costs here and below.